The Ninth Circuit has given the green light to the American Postal Workers Union AFL-CIO in that it's ok to ignore and to delay the expectation of an arbitration hearing which workers depend on greatly. The Ninth Circuit says this type of behavior is not bad faith.

This case is also interesting. It shows how the American Postal Workers Union AFL-CIO can practically escape liability in Federal Court especially with a Pro Se litigant via subterfuge and confusion. If the Supreme Court does not address this issue, the union will have itself a plan of action in order to elude liability.

Unlike the postal service, an agency of the government, it will notify a plaintiff of the proper type of effected service; as in a letter from a special assistant U.S. attorney written to petitioner. Appendix D. What bolsters this double-dealing is the fact that the (APWU) Local, San Francisco, Ca., did not file a response to the Ninth Circuit Court of Appeals in this action. The Ninth Circuit did not even mention this.

In Appendix C, petitioner submits a non published case where summary judgment was awarded to the defendant. In this case of O'Quinn v. Raley Teel, the Ninth Circuit applied an appellate review procedure called "the burden-shifting framework." Petitioner has not been afforded this Appellate review procedure. Therefore, review is warranted because Supreme Court Precedents, appellate burden-shifting framework, FRCP 56 and evidences including the reasons above have not been applied to petitioner, but avoided.

In petitioner's case, the union tried to rid of petitioner, by simply ignoring numerous phone calls by petitioner. There was an arbitration hearing – 27 months from the day petitioner was put on suspension.

This ignoring along with the fact that nothing was being done about petitioner's grievance seems to violate Robesky v. Qantas Empire Airways LTD, 573 F.2d 1082, 1088 (9th Cir.1978); Ruzika v. General Motors Corp. 523, F.2d 306, 310 (6th Cir. 1975); Vaca v. Sipes 386 US 171, 191 and a dissent by Mr. Justice Rehnquist in Hines v. Anchor Motor Freight, Inc., 424 US 554, 574 (1976) "inaction as to imply bad-faith on the part of the union." Ford Motor v. Huffman 345 US 330, 338.

In Robesky, supra, the court said – The district court found appellant was kept in ignorance of the union's determination that her grievance would not be taken to arbitration because of a deliberate decision by the union officials and not through oversight. The Court found the union decided to withhold the information from appellant.

Even more contrasting with what, the Ninth Circuit said in petitioner's decision. In Ruzika, supra, the court said – We believe that the District Court Misread Vaca when it held that "bad faith" must be read into the separate and independent standards of "arbitrary or discriminatory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

The Local did not inform either appellant or GM that it had decided either to continue or to stop processing appellant's grievance. Such negligent handling of the grievance, unrelated as it was to the merits of appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance.

Ruzika, supra, is the complete opposite to what the Ninth Circuit decided in petitioner's case, or the Ninth Cir. Has decided counter to other Cir. Cases and perhaps supreme court precedent.

In Vace, supra, the Supreme Court said "a union may not arbitrarily ignore a meritorious grievance." In petitioner's case, the ignoring was deliberate. However, there was an arbitration hearing. Petitioner provided 12 pages of phone records in his (MSJ). Petitioner did prove perfunctoriness on the part of the union. The Arbitrator himself said in his 10 page decision – page 6, paragraph 3, line 2. In a direct comment about the union, the arbitrator said "There was nothing presented at the Hearing to give the Arbitrator any information on which to exclude the information presented." This is a direct Violation of Vaca, supra. But, the lower courts just ignored this evidence in petitioner's MSJ.

The lower courts also ignored Supreme Court Precedents in petitioner's MSJ where petitioner provided evidences that the Union made 3 documented unsupported Lies to the Arbitrator. Dishonesty violates Supreme Court precedent. In Hines v. Anchor Motor Freight, Inc. 424 US 554, 564, 571 (1976) The union as the statutory representative of the employees is subject always to complete good faith and honesty of purpose in the exercise of its discretion. Id. 564.

But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory. Id. 571

In Ford Motor v. Huffman, 345 US 330, 338. A bargaining representative in serving the unit it represents is subject always to complete good faith and honesty of purpose in the exercise of its discretion. Id. 338

In Vaca v. Sipes, 386 US 171, 177 - The court said the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

The last lie the union made was to the arbitrator. The representative claimed he was going to be on vacation the entire month of Dec. 2001. The Arbitrator asked for briefs on Nov. 29, 2001, the last day of a two day hearing. The arbitrator said "ok Jan. 15, 2002."
On the face of the arbitrator's decision, it shows, the PMG filed His brief on Jan. 15, 2002; this was included in petitioner's MSJ. The lower courts ignored this too. Clearly, this too does not serve the interest of petitioner which appears to violate Ford motor, supra, where complete Loyalty is owed.

If there was a case that has been decided wrongly in light of Supreme Court Precedent is Petitioner's case.

CONCLUSION:

The words on the front of the Court House say "Equal Justice Under Law." But, Petitioner has not experienced this with the Lower courts.
If, we can compare Petitioner to Bowen, supra, petitioner was terminated the exact same way as Bowen. Petitioner proves this with the letter of removal. According to Ruzicka, supra, the union did not inform, but ignored petitioner; this perfunctory handling of petitioner's grievance continued on through the arbitration hearing and after the hearing.

Petitioner uses the Court cases provide in his MSJ as Law the defendants violated. Therefore, the evidences provided along with stare decisis should have been applied to petitioner in his MSJ. But, the lower courts ignored this as if petitioner proceeded on a complaint alone. Petitioner now appeals to the U.S. Supreme Court from which his MSJ was based.

Petitioner is quite able and ready to proceed with oral argument.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Robert Aparicio

Pro Se.

Dated: 5-24-05

APPENDIX A

UNITED STATES COURT OF APEALS
FOR THE NINTH CIRCUIT

No. 04-15769, D.C. No. 02-03024-JSW

Filed April 07, 2005.

Robert E. Aparicio,

Plaintiff – Appellant,

v. MEMORANDUM

John E. Potter, Postmaster General (USPS); et al.,

Defendants – Appellees.

_____/

Appeal from the United States District Court
For the Northern District of California
Jeffrey S. white, District Judge, Presiding

Submitted April 4, 2005**

Before: KOZINSKI, HAWKINS, AND CLIFTON, Circuit Judges.

Robert E. Aparicio appeals pro se the district court's summary judgment for
Defendants in his action against the American Postal Workers Union for breach of

- This disposition is not appropriate for publication and may not be cited
- To or by the courts of circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App.P. 34(a)(2).

the duty of fair representation, and against the Postmaster General for wrongful termination. We have jurisdiction to 28 U.S.C. s 1291. We review de novo, Patterson v. Int'l Bhd. Of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997), and we affirm.

The district court properly granted summary judgment for the American Postal Workers Union, AFL-CIO ("the National Union") because Aparicio failed to raise a genuine issue of material fact as to whether the National Union's handling of his grievances, or its representation during arbitration with the Postal Service, was "arbitrary, discriminatory, or in bad faith." Truesdell v. S. Cal. Permanente Med. Group, 293 F.3d 1146, 1153 (9th Cir. 2002). Aparicio's allegation that his representative from the National Union ignored phone calls and caused delays in the proceedings does not constitute a claim for bad faith. See patterson, 121 F.3d at 1349. Mere negligence in the handling of a grievance does not breach the duty of fair representation. Id.

The district court properly granted summary judgment for the American Postal Workers Union, San Francisco Local ("the Local Union") because Aparicio failed to raise a genuine issue of material fact as to whether the Local union owed Aparicio a duty of fair representation for portions of his grievance over which the National Union had exclusive control.

The district court properly granted summary judgment for the Postmaster General with respect to Aparicio's wrongful termination claim because Aparicio failed to establish that the National Union breached its duty of fair representation, and thus, the collective bargaining agreement provides the exclusive remedy for the parties. See Stevens v. Moore Bus. Forms, 18 F.3d 1443, 1447 (9th Cir. 1994) (an employee may not bring a wrongful termination claim in federal court against the employer unless the employee can show that the union breached its duty of fair representation).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT E. APARICIO,

Plaintiff,

No. C 02-0324 JSW

v.

John E. Potter, Postmaster General; American Postal Workers Union; AFL-CIO; AND American Postal Workers Union, San Francisco Local, AFL-CIO,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT & DENYING PLAINTIFF'S MOTION For SUMMARY JUDGEMENT

This employment dispute arises from the termination of Plaintiff Robert E. Aparicio from the United States Post Office (the "Postal Service"). Aparicio commenced the dispute against the Postal Service, the American Postal Workers Union (the "National"), and the American Postal Workers Union, San Francisco Local, AFL-CIO (the "Local"). At the core of this case is a discharged employee, Aparicio, who believes that his union failed him. However, Aparicio fails to meet his burden on summary judgment to produce evidence that a reasonable jury could construe to show that his union breached its duty of fair representation. Accordingly, the cross-motions for summary judgment filed by the Local and National are GRANTED and Aparicio's motion for summary judgment is DENIED.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

On the evening of January 30, 1999, Aparicio's supervisor summoned Aparicio, a postal clerk, for a disciplinary meeting. (Decl. of Robert Williamson ("Williamson Decl.") at = 5, Exh. 4; Decl. of Robert E. Aparicio ("Aparicio Decl.") , Exh. B.) A dispute ensued. (Williamson Decl.,Exh. 4; Aparicio Decl., Exh. I at 1.)

The Postal Service sent Aparicio home, suspended him, and began a process that resulted in Aparicio's termination in April 1999. (Williamson Decl. at = 5 ; Aparicio Decl., Exhs. A & E.) Aparicio filed a grievance in accordance with the collective bargaining agreement ("CBA") between the National and the Postal Service. (Williamson Decl. at = 6; Aparicio Decl., Exh. B.)

Under the CBA, the local administers the first two steps of the grievance process. (Williamson Decl. at = 7.) The National oversees "Step 3" and any arbitration proceedings. (Id.) The Local denied Aparicio's grievance in "Step 1" and "Step 2 (Id. At = 8.)

On August 24, 1999, the National appealed Aparicio's grievance directly to arbitration in lieu of a Step 3 proceeding. (Id. At = 9; Id., Exh. 3.)

In August 2001, the Regional Coordinator of the National assigned Robert Williamson to be Aparicio's representative; the National scheduled the arbitration date for September 21, 2001. (Id. At = = 2,, 11.) The arbitration began on September 21, 2001, and several witnesses testified about Aparicio's conduct on January 30, 1999. (Williamson Decl. at = 17.) on November 29, 2001, the second day of the arbitration,

In August 2001, the Regional Coordinator of the National assigned Robert Williamson to be Aparicio's representative; the National scheduled the arbitration date for September 21, 2001. (Id. At = = 2, 11.) The arbitration began on September 21, 2001, and several witnesses testified about Aparicio's conduct on January 30, 1999. (Williamson Decl. at = 17.) On November 29, 2001, the second day of the arbitration, Williamson called Aparicio as a witness. (Williamson Decl.at =20; Amd. Comp. at 4-5.) On April 10, 2002, the arbitrator found that the Postal Service had just couse to remove Aparicio. (Williamson Decl., Exh.7.)

Aparicio filed a complaint in this Court on June 25, 2002, for wrongful termination in violation of the collective bargaining agreement. The Postmaster General moved for judgment on the pleading. On December 20, 2002, United States District Court Judge Illston granted the Postmaster General's motion for judgment on the pleadings with leave to amend, holding that Aparicio's exclusive remedy is governed by the CBA. Judge Illston granted Aparicio leave to file an amended complaint to allege that his union breached the duty of fair representation.

If Aparicio could demonstrate a breach, he would be freed from the contractual constraints of the CBA and could pursue recovery from both the union and the Postal Service. * Aparicio filed his amended complaint on January 3, 2003, Now before the Court are the parties' cross-motions for summary judgment.

1. Summary Judgment Standard ANALYSIS

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249 (1986). A principal purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477, U.S. 317, 323-24 (1986).

The party moving for summary judgment bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323.

The court may not weigh evidence or make credibility determinations, and is required to draw all reasonable inferences in a light most favorable to the non-moving party. Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). However, an inference may be drawn in favor of the non-moving party only if the inference is reasonable under the governing substantive law. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588 (1986).

*The motion for judgment on the pleadings was brought by the Postmaster General; nevertheless, the Order granting the motion disposed of the case against the union based on lack of subject matter jurisdiction over any of the allegations.

11. Duty of Fair Representation

"The duty of fair representation is inferred from the union's exclusive authority under the National Labor Relations Act, 29 U.S.C. s 159(a), to represent all employees in a bargaining unit and 'to act fairly when dealing with an employer on behalf of a member." Stevens v. Moore Bus. Forms, Inc., 18 F.3d 1443, 1447 (9th Cir. 1993). A union's breach of the duty of fair representation "relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures." Hines v. Anchor Motor Freight Inc. 424 U.S. 554, 567 (1976) (holding that a union's breach of the duty of fair representation by failing to perform a minimum of investigation on behalf of employees discharged for dishonesty could relieve the requirement that disputes settle through contractual procedures).

The Court evaluates the conduct of the Local and National in turn.

A. The Local

B. The Local argues that it did not breach its duty to Aparicio because the National had exclusive control over that portion of the grievance process in which Aparicio alleges the breach occurred.

Aparicio alleges that the unfair representation began when the union did not process Aparicio's Step 3 grievance and sent the matter to arbitration. (First amd. Complt. At 3.) The National had exclusive control over the decision to proceed to arbitration and over Aparicio's representation. (Williamson Decl. at = 7.) Even though Williamson, the Local's president, represented Aparicio, Williamson served as the agent of the National. (Id. At = 11.) The Local owes no duty of fair representation at Step 3 or at the arbitration because the National had exclusive control over these portions of the grievance process. (Id. At = = 7, 9.) Aparicio has made no allegation that the Local provided deficient or actionable representation during Step 1 or Step 2. For these reasons, Aparicio fails to "set forth specific facts showing that there is a genuine issue for trial" with regard to the Local. Fed. R. Civ. P. 56(3). The Local is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. The Court, therefore, denies Aparicio's motion for summary judgment with regard to the Local, and grants the Local's motion for summary judgment.

C. The National

1. Duty of Fair Representation Standard

Aparicio alleges that the National breached the duty of fair representation by delaying the arbitration proceedings and acting in bad faith during the proceedings. In order to determine whether the Ntional breached the duty of fair representation, the Court must first determine the appropriate standard under which to analyze the National's representation. "if the conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. However, if the conduct involved the union's judgment, then the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith." Wellman v. Writers Guild of Am., West, Ind., 146 F.3d 666, 670 (9th Cir. 1998). Union actions commanded or prohibited by union rules or policies involving little or no discretion are generally ministerial in nature. Id. At 671. By contrast, a union's decision about how best to handle a grievance is a matter of judgment. Id.

Aparicio's allegations center on the quality of the representation he received. In general, a union's decision about how best to handle a grievance is a matter of judgment. Id. At 671. Aparicio does not assert any authority or other ground suggesting that the Court should depart from this general rule. Accordingly, the proper inquiry is whether the National's conduct was discriminatory or in bad faith. Id. Aparicio's First Amended Complaint does not allege discrimination; therefore, the Court moves to the issue of bad faith.

2. Bad Faith

The burden is on the plaintiff to produce evidence of bad faith. Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003). Mere negligence is not enough to show a breach of the duty of fair representation. Clayton v. Republe Airlines, Inc., 716 F. 2d 729, 732 (9th Cir. 1983). An error in judgment does not constitute bad faith. Stevens, 18 F.3d at 1448. In order to prevail at trial, Aparicio must produce evidence that the alleged hostility motivated the National, as opposed to legitimate reasons. Conkle v. Jeong, 73 F.3d 909, 916 (9th Cir. 1995). When a union makes a reasoned tactical decision not to provide evidence, that decision does not amount to a breach of the duty of fair representation. Patterson v. Int'l. Bhd. of Teamsters, Local 959, 121 F.3d 1345,1350 (9th Cir. 1998).

a) The Selection of Williamson

Aparicio provides no evidence to support his contention that the National acted in bad faith when it selected Williamson and sent his grievance to arbitration. In Conkle, the Ninth Circuit held that while union leadership may have had a personal animus against a union member, the aggrieved union member had the burden of showing that the animus motivated the leadership's decisions regarding the union member. 73 F.3d at 916. Aparicio fails both to present any evidence that Williamson or the National had any hostility towards him and further that the alleged hostility motivated the National.

b) Williamson's Representation

There is no evidence that Williamson's cross-examination of witnesses and direct examination of Aparicio amounted anything more than reasoned tactical decisions. In Patterson, the Ninth Circuit held that a reasoned tactical decision does not amount to breach of the duty of fair representation.

The court stated, "[i] f a union provides a reasoned explanation for not pursuing a potential defense, we may not second guess its decision." Patterson, 121 F.3d at 1349. In the instant case, not only has Aparicio failed to provide evidence that Williamson represented Aparicio in bad faith, but the National has also provided a reasoned explanation for its decisions. The National asserts that Williamson made tactical decisions regarding the extent to which he conducted cross-examination and how he approached Aparicio's direct examination. (Willaimson Decl. at = = 15, 18, 21.) Based upon a review of the record before the Court, the National's explanation is reasonable.

Aparicio's allegations of delay and unreturned phone calls do not amount to bad faith. Mere negligence is not enough to amount to a breach of the duty of fair representation. Clayton, 716 F. 2d at 731. Additionally, Aparicio's claims of unreturned phone calls and delays fail to show any material influence on the arbitrator's decision to uphold the termination. See Patterson, 121 F.3d at 1350.

Aparicio must set forward specific facts supported by admissible evidence, i.e., affidavits or certified deposition testimony, showing that there is a genuine issue for trial. . See S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., 690F.2d 1235, 1238 (9th Cir. 1982) (stating that "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda"). Aparicio does not provide evidence that would allow a reasonable jury to find in his favor. See Anderson, 477 U.S. at 248-49. Accordingly, the National is entitled to judgment as a matter of law. See Celotex, 477 U.S. at 323. Plaintiff has not met his burden; his subjective belief that the Union was hostile toward him or represented him in an arbitrary or negligent manner is insufficient to survive summary judgment.

111. The Postmaster General

Judge Illston previously held that because of the binding arbitration clause in the CBA, Aparicio may not pursue a remedy against the Postal Service unless he first demonstrates that the union breached the duty of fair representation. As discussed above, Aparicio has failed to meet his evidentiary burden to show such a breach. Consequently, the Court denies Aparicio's motion for summary judgment with regard to the Postmaster General.

1V. Plaintiff's Motion for Summary judgment

Also pending before the Court is plaintiff's motion for summary judgment on the issue of whether the Postal Service violated the CBA by terminating Aparicio and whether the union's conduct towards Aparicio was arbitrary or perfunctory or in bad faith. As discussed above, Aparicio has failed to provide evidence sufficient to create a genuine issue of material fact as to whether either union provided representation that was discriminatory or in bad faith. Further, because Aparicio has not demonstrated that either union breached the duty of fair representation, the Court lacks subject matter jurisdiction over the wrongful termination claim against the Postal Service due to the binding arbitration agreement. There being no other issue raised by Aparicio's motion for summary judgment, the Court denies the motion.

CONCLUSION

For the foregoing reasons, the court GRANTS the cross-motions for summary judgment filed by the National and Local unions, and DENIES Aparicio's motion for summary judgment. Aparicio's claims for breach of the duty of fair representation are DENIED with prejudice.

IT IS SO ORDERED.

Dated: MAR 30 2004 /s/_____
Jeffrey S. White
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-16242 D.C. No. CV-02-00308-MCE

JOHN Q'QUINN,

Filed APR 05 2005

Plaintiff – Appellant,

MEMORANDUM*

v.

JOYCE RALEY TEEL; et al.,

Defendants – Appellees.

/

Appeal from the United States District Court
For the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted February 17, 2005
San Francisco, California

Before: THOMAS, PAEZ, AND CALLAHAN, Circuit Judges.

In this civil rights action alleging race discrimination in violation of Title V11 of the Civil rights Act of 1964 and the California Fair Employment and Housing Act ("FEHA"), age discrimination in violation of the Age Discrimination

- This disposition is not appropriate for publication and may not be cited to or by the court of this circuit except as provided by Ninth Circuit Rule 36-3.

in Employment Act of 1967 and FEHA, and breach of contract, Plaintiff John O'Quinn appeals the district court grant of summary judgment to defendants. 1

We review the district court's grant of summary judgment do novo. Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004). Viewing the evidence in the light most favorable to the nonmoving party, we conclude that there are genuine issues of material fact and reverse the grant of summary judgment as to O'Quinn's race discrimination claim. See Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1065 (9th Cir. 2004).2

Applying the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the district court correctly concluded that O'Quinn established a prima facie case of race discrimination. See Warren v. City of Carlsbad, 58 F.3d 439, 441-42 (9th Cir. 1995). "The burden therefore shifted to respondent to 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'" Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142 (2000) (quoting Texas Dept. of Cmty.

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1 In his appeal, O'Quinn does not challenge the district court's adverse summary judgment ruling on the breach of contract and age discrimination claims. Therefore, we do not address these claims.

2 Because the parties are familiar with the facts of the case, we recite them only as necessary to explain our disposition.

Affairs v. Burdine, 450 U.S. 248,254 (1981)) (alteration in original). Raley's proffered a legitimate, nondiscriminatory reason for not promoting O'Quinn—that O'Quinn was less qualified than chosen candidates.

Once the defendant has produced evidence of a nondiscriminatory reason, the burden shifts back to the plaintiff to show that '"the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."' Reeves, 530 U.S. at 143 (quoting Burdine, 450 U.S. at 253). "[A] plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer," Chuang v. Univ. of Cal Davis, 225 F.3d 1115,1127 (9th Cir. 2000).

O'Quinn relies upon circumstantial evidence to show that Raley's nondiscriminatory reason was pretextual and that race was a motivating factor in the promotion process. O'Quinn first presented evidence of his thirty years of experience working in various departments and holding positions that required management and customer service skills. As O'Quinn points out, in evaluating the qualifications of promotional candidates, Raley's engaged in a highly subjective process. In such circumstances, this court has recognized that because subjective practices are "particularly susceptible to discriminatory abuse," they should be "closely scrutinized." Warren, 58 F.3d at 443 (citation omitted). Futher, "whether [O'Quinn was] as qualified as any of the promotion recipients is a factually intensive question best resolved by the jury." Lyons v. England, 307 F.3d 1092, 1117 (9th Cir. 2002).

In addition to the evidence of his qualifications, O'Quinn offered circumstantial evidence of racial discrimination. Ron Hensley, O'Quinn's supervisor, told O'Quinn that under no circumstances would he ever allow himself to be bossed around by a black man. Whether Raley's "sufficiently insulated the decision-making process form [Hensley's] discriminatory remarks" is a question that should be left to the factfinder. SeeSchnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1411 (9th Cir. 1996). Similarly, on two occasions the former Oroville store manager, Bob George, informed O'Quinn that O'Quinn could not be promoted to head clerk on the day shift because of the risk that O'Quinn could not handle an irate customer who might call him a "nigger."3

3In the context of a summary judgment motion, the district judge's characterization of this comment as "entirely appropriate" because George was "questioning [O'Quinn's] reaction to a difficult situation" was improper. In characterizing this comment as "appropriate," the district judge failed to view the evidence in the light most favorable to the non-moving party. See Chuang, 225 F.3d at 1129 (holding that the district court erred in drawing an inference that a

3. O'Quinn also offered evidence showing that he was subjected to racial comments in the workplace. Although these comments are not directly tied to the decision-making process, we have recognized that remarks may be part of the cumulative evidence of pretext. See, e.g., mcGinest v. GTE Serv. Corp., 360 F.3d 1103, 1123-24 (9th Cir. 2004); Bergene v. Salt River Project Agric. Imp. & Power Dist., 272 F.3d 1136, 1143 (9th Cir. 2001).

4. Finally, as additional evidence of racial discrimination at Raley's, O'Quinn points to the fact that he was the only African American candidate and that there were no African American supervisors at the
   4 Oroville store, the two Chico stores, or the Yuba City store. See Bergene, 272 F.3d at 1143; Chuang, 225 F.3d at 1127.

In light of the evidence offered by O'Quinn, viewed in the aggregate, we conclude that O'Quinn has raised triable issues of fact as to pretext and discriminatory intent. See Chuang, 225 F.3d at 1129. We therefore reverse the district court's grant of summary judgment as to O'Quinn's claim of race discrimination.

REVERSED AND REMANDED.

3(...continued)
racial comment was humorous).

APPENDIX D

Excerpts from petitioner's evidences used in petitioner's MSJ:

1. Letter: Subject: EMERGENCY PLACEMENT IN OFF-DUTY STATUS

   Date: February 1, 1999

   To: Robert E. Aparicio, Full Time Clerk

You are hereby notified that you have been placed in an off-duty (without pay) status effective February 1, 1999 at 2375 and will continue in the status until you are advised otherwise.

End.

2. Letter: Subject: Notice of Removal
April 12, 1999, You are hereby notified that you will be removed from the U.S. Postal Service, effective close of business on May 24, 1999.
Page 3 of letter of Removal, 1. Your record reflects that you have been issued the following disciplinary actions: 1. Notice of Seven Calendar Day Suspension dated September 25, 1997 for Unsatisfactory Conduct – Failure to Follow a Direct Order.

2. Letter of Warning dated November 14, 1996, for Unacceptable Conduct- Disrespect to a Postal Supervisor

End.

3. Contract: Collective Bargaining Agreement, Between American Postal Workers Union, AFL-CIO and U.S. Postal Service, November 21, 1998 – November 20, 2000.

ARTICLE 16, DISCIPLINE PROCEDURE, Section 10. Employee Discipline Records, The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

End.

Petitioner's Note: Petitioner received full back pay for the 7 day suspension. At the time of January 30, 1999, the letter of Warning was not to be cited by the (PMG) according to the CBA, a clear violation of the CBA. And, hence, petitioner was terminated the exact same way as BOWEN, supra.

4. Telephone Records: Page 11 of 12 pages of telephone records Petitioner was able to acquire from the Telephone Co. in the year 2001.

MY14	1122a	WASHINGTONDC	Dir	Day	3
MY21	828a	WASHINGTONDC	Dir	Day	3
JN06	824a	WASHINGTONDC	Dir	Day	2
JN08	650a	WASHINGTONDC	Dir	Day	3
JN08	846a	WASHINGTONDC	Dir	Day	2
JN20	733a	WASHINGTONDC	Dir	Day	3
JN20	1118a	WASHINGTONDC	Dir	Day	1
JN21	729a	WASHINGTONDC	Dir	Day	2
JN22	649a	WASHINGTONDC	Dir	Day	12.

Petitioner's Note: Petitioner was forced to call the headquarters of the Union in Washington DC because the Local union was ignoring petitioner.

5. Arbitrator's 10 page decision: Brief's Filed, USPS 1/18/01: APWU April 9, 2002.

Date of Award: April 10, 2002.

Page 6, Par. 3, Line 2, The Arbitrator said "There was nothing presented at the Hearing to give the Arbitrator any information on which to exclude the information presented." PAGE 5, Par. 2, Line 3, UNION ARGUMENTS: The supervisor Remo has an animosity against the Grievant because of prior EEO activity.

Petitioner's Note: On Nov. 29, 2001, the union representative tells the Arbitrator that he will be on vacation for the month of December 2001. Therefore, the Arbitrator says "ok Jan. 15." In a request for production of Documents, petitioner asked for the clock-rings of the union representative for the month of Dec. 2001. The union Rep. was at work the entire month of Dec. 2001 according to the PMG's clock-rings. However, petitioner only used 1 page of the clock-rings in petitioner's MSJ, exhibit L.

When the Arbitrator says "There was nothing presented at the Hearing." This statement says a lot: Perfunctoriness and that the union made no investigatioin.

Petitioner uses the 3rd documented Lie the union made to the Arbitrator. Prior to April 1999, petitioner never before filed an EEO complaint against the supervisor Remo despite the numerous harassments against petitioner. In Exhibit B, page 2, Par. 4, Line 2, Supervisor Remo himself acknowledges that petitioner never filed an EEO complaint against him.

End.

APPENDIX E

Letter, from the U.S. Department of Justice, Untied States Attorney Northern District of California. July 10, 2002. Re: Robert E. Aparicio v. William J. Henderson, et al. Civil Action No. C 02-3024 SI

Dear Mr. Aparicio: We have received a copy of the Complaint in this action from Glen D. Williams the assigned agency counsel, U.S. Postal Service Law Department, San Francisco. However, you have not properly served the United States or its agencies or employees.

Please note that Rule 4(i), Federal Rules of Civil Procedure, as amended effective December 1, 2000, requires the following:

(i) Serving the Unitied States, Its Agencies, Corporations, Officers of Employees.

(1) Service upon the United States shall be effected
(A) by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought or to an Assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney and. Petitioner's note: so on and so forth. Very truly yours, DAVID W. SHAPIRO United States Attorney By: /s/ PATRICIA BENTON Special Assistant United States Attorney.

Excerpt from MSJ hearing transcripts, July 18, 2003, all of which was included in Petitioner's appeal to the Ninth Circuit. There are 25 pages of transcripts. Here, petitioner uses pages 12 – 15 to show three things: 1. it shows the confusion when all-of-the-sudden there are two unions. And, 2. It shows, it appears, the District court actually goes along with what the Unions are doing, confusion. 3. That the union really never had a defense to Petitioner's case. (petitioner's note).

Page 12, Line 4, Ms. Miller: I'm here for APWU National. I'm appearing for APWU National's motion to dismiss, and our opposition to the summary judgment are fairly simple and straightforward. We were not aware of this litigation until shortly before we filed our motion to dismiss and our opposition. We became aware of the existence of the litigation from counsel for the Local.

We were never served with a summons and complaint, and over 120 days have passed since the filing of the first amended complaint.

My understanding from looking at the papers in this case is that in the initial complaint, there was some dispute about whether the actual complaint was served in addition to the summons. Mr. Aparicio was given an opportunity to file a first amended complaint and serve that. Counsel for the Local had agreed to accept service for the Local, but the national was never served.

THE COURT: Okay. When all is said and done, however, from what I am hearing from the argument, putting aside the issue of service, without minimizing your motion, I take it that the national union is a proper party here or, at least, arguably, a proper party.

MS. MILLER: Arguably so. THE COURT: Because what I want to get to here, if possible, because the court always like to resolve these matters on the merits; and again without giving up your point, what I am going to try to do today is put the case in a posture where it possibly could be resolved on the merits.

If we - - obviously, you have a right to insist upon proper service in a timely fashion on your client, but I'm wondering whether that's a point that the national union wishes to continue to pursue or is willing to, with proper regard to having adequate time to respond - - you already responded - - but to file, perhaps, its own motion, if that's the way you choose to go. That might expedite this case.

MS. MILLER: The national would like the opportunity to be served properly, have an opportunity to answer the complaint, have an opportunity to conduct discovery, if necessary, or to file dispositive motions, if necessary.

THE COURT: All right. Okay. Fair point. All right. Do you have anything else to add? MS. MILLER: NO, your Honor, I don't. THE COURT: The only thing that you have pending is the motion to dismiss for insufficiency of process or lack of process? MS. MILLER: Correct. THE COURT: All right. Do you need to respond to what both counsel have said? I'm going to address - - you don't have to respond with respect to the motion to dismiss, because that's a technical point, and it looks like you haven't properly served the national union. I mean, you read their papers; correct? MR. APARICIO: right. THE COURT: Do you have any dispute about that, having read their papers, that you didn't properly serve the national union?

MR. APARICIO: Well, all I know is I served the local. I don't know - -

THE COURT: Let me just say, they are a separate legal entity even though they have similar sounding names. Frequently that happens, but it's almost like having two different people. Each entity is a person for purposes of a lawsuit, and each someone is separate. So you have to serve each one of then separately. Serving one just because it may have the same name or may be affiliated in some way is not sufficient when they are totally separate entities. Do you understand that? MR. APARICIO: Right. THE COURT: So I'm not going to ask you to respond with respect to the national union's motion to dismiss. Do you have anything additional to add based upon the local union's argument in their motion for summary judgment against you? MR. APARICIO: Well, the Arbitrator, himself, acknowledges that the union did nothing to provide any information from which he could make a decision in a different manner.

The union, Bob Williamson, did no discovery. He did no investigation, which is required form the Supreme Court, and it's obvious from the phone records that the attitude of the president local was in bad faith towards plaintiff.

THE COURT: The issue - - the issue that the court is going to have to resolve, which is as a matter of law - - let's assume everything you say and you said in your papers is true, whether that is sufficient to say that there's a real dispute here legally about whether or not your rights were violated as alleged in the complaint, and that's something that I have to sort out. Is there anything else you would like to add at this time? MR. APARICIO: only that the union was in bad faith, and the matter was perfunctory at the arbitration hearing. THE COURT: Do you want to respond to that last point briefly about the phone records and what the arbitrator allegedly admitted to?

MS. SAWISLAK: I'm not quite sure what Mr. Aparicio was referring to in his comments about the Arbitrator. End of page 15, of transcripts.

Petitioner's note, Both, the National and Local unions, APWU did not have one piece of evidence to counter petitioner's evidences; The End, Thank you.

Supreme Court, U.S.
FILED
OCT 12 2005
OFFICE OF THE CLERK

No. 04 - 1599

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT E. APARICIO, PETITIONER.

V.

JOHN E. POTTER, POSTMASTER GENERAL, U.S. POSTAL SERVICE; and
American Postal Workers Union AFL-CIO, (APWU); and
American Postal Workers Union AFL-CIO, San Francisco Local, (APWU).

RESPONDENTS.

PETITION FOR REHEARING.

ROBERT E. APARICIO
2138 Vestal st.
Castro Valley, Ca. 94546
1-510-581-7564.

Title 39 1208 (b) was not allowed to be enforced by the lower courts cited by Petitioner; nor the relevant cases and Precedents cited, nor F.R.C.P. 56. Hence, Petitioner's appeal to the Supreme Court. The respondents did not file a response knowing Petitioner has been correct with the facts and evidences and Laws.

The Postmaster General will continue to deny some employees of Due Process and to destroy lives ,as with Petitioner, along with the American Postal Workers Union AFL-CIO. Also, the confusion and subterfuge the union will exercise in the lower Courts.

Petitioner sought to have the fundamentals of Law 101 applied in the Lower courts, it has not occurred.

The court system ,as we all know it today, began two years after the nation of Israel Left Egypt - exact year is un-known. There, the Lord God told the man Moses in the Book of Leviticus in the Bible - chapter 19 verse 15 "You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. But in righteousness you shall judge your neighbor."

Also, in chapter 24 verse 22, God says "You shall have the same Law for the stranger and for one from your own country; "

This verse can be taken as Petitioner not being a member of the American Bar Association. The former verse is quite obvious. These basic principles Of Equal Justice Under Law have not been bestowed to Petitioner. Petitioner seeks a rehearing on the merits.

Date:_____ Signed:_____

Robert E. Aparicio
Pro Se.

PURSUANT TO RULE 44.2, I Petitioner, Robert E. Aparicio Certify that this petition for rehearing is presented in good faith and not for delay.

Date: 10-12-05 Sign: Robt E. Aparicio

Robert E. Aparicio
Pro Se.